The Act is a vast improvement upon the English model and is a fine piece of legislation, both as regards substance and legislative draftsmanship.

CAN A SOLDIER UNDER AGE MAKE A VALID WILL?

When a nation is in arms questions which have been thought only of academic interest may become of large practical moment. The age at which a soldier or sailor attains testamentary capacity is an instance in point, for the armies and navies of the warring nations contain many boys under 21. A recent English case involved the will of an infant officer of the British army who attempted to dispose of £1,000,000 over which he had a testamentary power of appointment. He was killed in action, while still an infant, and his will was admitted to probate as a soldier's will under section 11 of the Wills Act of 1837. Section 7 of the Act declares that no will made by any person under 21 years of age shall be valid; sections 9 and 10 prescribe the formalities for executing wills; and section 11 reads: "Provided always and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." Questions arising as to the validity of the attempted exercise of the power of appointment, the case came before the Chancery Division. It was held that so long as the probate stood unrevoked the testamentary power of appointment was validly exercised; but the learned judge expressed the opinion that the practice of admitting to probate wills of infant soldiers was not justified by the Wills Act and that if the question should come before the Court of Appeals it would be necessary under existing legislation to declare such wills invalid. *Re Wernher* (1918, Ch. D.) 117 L. T. Rep. (N. S.) 801.

The age at which a person shall be deemed to have legal capacity to make a will depends upon the provisions of the statute governing the making of wills. American statutes closely follow those of England—either the Statute of Frauds of 1676 or the present Wills Act of 1837. The tendency of modern legislation has been to advance the age of testamentary capacity and many of the American states[1] now place it at 21, as does section 7 of the Wills Act. Likewise many of the American statutes[2] have provisions favoring the wills of soldiers and sailors and corresponding to section 11 of the Wills Act. The English decisions therefore will be of value in helping to solve under American statutes the problem whether a soldier under age can make a valid will.

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[1] See 1 Schouler, *Wills* (5th ed.) secs. 39–43; Rood, *Wills*, sec. 126 *et seq.*

[2] See 1 Schouler, *op. cit.* sec. 365 *et seq.*; Rood, *op. cit.* sec. 238.

The opinion of Justice Younger in the principal case contains so admirable a review of the origin and history of the special favor which the law shows to soldiers and sailors in the making of wills that it would be useless to attempt to add to it.[3] But a summary of his argument may be of interest to American readers. Prior to the Statute of Frauds no formality of execution, nor even a writing, was required for the testamentary disposition of personal estate, and testamentary capacity was deemed to exist at the age of 14 for males and 12 for females. When the Statute of Frauds introduced certain forms and solemnities into the making of wills of personalty it was thought expedient to reserve—as was done by section 23[4]—their former privileges to soldiers in actual military service and to sailors at sea, because their peculiar circumstances rendered it more difficult for them to observe the forms required of testators in ordinary circumstances. The Statute of Frauds contained no provision as to the age required for testamentary capacity and the reservation by section 23 of the soldier's privilege did not lower the age at which he was competent to make a will. It simply did away with the formalities of execution.[5] With this survey of the earlier law, it seems clear that section 11 of the Wills Act does not affect the capacity to make a will—the age of capacity being fixed at 21 years by section 7, just as before that Act it had been fixed at 14 years for males by the established common-law rule, unchanged by the Statute of Frauds—but reserves merely the privilege of disregarding formalities of execution, just as did section 23 of the Statute of Frauds. And this is made the clearer by reason of the form of section 11 which is that of a proviso following sections 9 and 10 which deal with the formalities of execution. Moreover, it is to be noticed that the privilege reserved extends only to the soldier who is in actual military service. When he returns to civil life it ceases. Now if the reservation were intended to confer capacity to make a will regardless of age how extraordinary it would be to withdraw it when the soldier returns to civil life, and thus leave him unable, until he should reach majority, to alter or revoke by a later will his military will.

The court's argument demonstrates beyond question the soundness of its interpretation of the statute. Yet the English text writers[6] have

[3] The special testamentary privilege extended to soldiers and sailors was borrowed by the common law from the civil law. 2 Justinian, *Institutes,* Title 11. See *Drummond v. Parish* (1843, Eng.) 3 Curt. Eccl. Rep. 522, 531; also *Leathers v. Greenacre* (1866) 53 Me. 561, 570.

[4] Section 23 reads: "Provided always: That notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he or they might have done before the making of this Act."

[5] This was the construction placed upon the privilege under the civil law. See Swinburne, *Wills,* 61.

[6] 1 Jarman, *Wills* (6th ed.) 102; Theobald, *Wills* (7th ed.) 56.

been accustomed to assert that soldiers in actual military service and sailors at sea may make wills of personalty at the age of 14, and it has been the practice of the English courts of probate to admit to probate the wills of soldier-infants. But, as Justice Younger points out, this rule and this practice originated in a case in which probate was granted on *ex parte* motion and without any adequate consideration.[7]

American text writers have been strangely silent on the subject. No discussion of the problem has been found in any of them. There is, however, one American decision which supports the view of Mr. Justice Younger.[8] It is believed that in this country as well as in England additional legislation will be necessary if soldiers or sailors are to have testamentary capacity at an earlier age than civilians.

WHAT IS COMMERCE?

It has been suggested in two legal periodicals[1] and held in two recent cases that interstate transportation of property by the owner for purely personal use is not interstate commerce. *United States v. Mitchell* (1917, S. D. W. Va.) 245 Fed. 601.[2] But inasmuch as there are at least two decisions squarely *contra*[3] and apparently none in accord, and inasmuch as the solution of the question goes to the very root of the whole commerce clause of the Constitution, the problem seems to be doubly worthy of consideration.

What, then, is commerce, or rather what is commerce in the sense in which that term is used in the Constitution? The specific aspect of this question as it arose in the principal case was whether the owner of intoxicants who personally carries the same from one state to another, not for purposes of trade but for personal use, is transporting intoxicants in interstate commerce. The court held that such a transaction is not interstate commerce for the reason that the term commerce *"necessarily connotes"* a business transaction. But does the term *commerce, in the sense in which it is used in the Constitution,* "necessarily connote" a so-called "commercial" transaction? It was argued in the leading case on interstate commerce that commerce was limited to traffic, but Mr. Chief Justice Marshall, speaking for the court, irrefutably answered the argument with the observation that *"this* [limitation] *would restrict a general term, applicable to many*

[7] *Re Farquhar* (1846) 4 Notes of C. 651; see also *Re M'Murdo* (1867) L. R. 1 P. & D. 540; Goods of Hiscock [1901] P. 78.

[8] *Goodell v. Pike* (1867) 40 Vt. 319.

[1] (1903) 3 COLUMBIA L. REV. 411; (1898) 12 HARV. L. REV. 353.

[2] The other case, from the Northern District of West Virginia, is unreported.

[3] *State v. Holleyman* (1899) 55 S. C. 207, 33 S. E. 366; *Alexander v. State* (1910) 3 Okla. Cr. 478, 106 Pac. 988.